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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK C. RUSCITTO,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

Petition of Frank C. Ruscitto For A Writ Of Certiorari

Joe H. Staley, Jr.*
Margaret A. Donahue

LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
Telephone: (214) 740-8000

Counsel for Petitioner

*Counsel of Record

February 10, 1992

QUESTIONS PRESENTED

1. WHETHER SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-14, PRECLUDES A COURT FROM ISSUING PRELIMINARY INJUNCTIVE RELIEF PENDING ARBITRATION OF A CONTRACTUAL DISPUTE.
2. WHETHER A COURT MAY CONSIDER THE MERITS OF A CLAIM SUBJECT TO ARBITRATION BY ISSUANCE OF INJUNCTIVE RELIEF.
3. WHETHER EXPEDITED ARBITRATION SHOULD BE THE *QUID PRO QUO* FOR A PRELIMINARY INJUNCTION GRANTED BY THE COURT.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties in the proceeding before the United States Court of Appeals for the Fifth Circuit. Petitioner is an individual; consequently, Rule 29.1 of the Supreme Court Rules does not apply.

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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Petitioner Frank C. Ruscitto respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case affirming, *per curiam*, the district court grant of a preliminary injunction against Petitioner and the district court denial of motions of Petitioner to compel arbitration and to stay further proceedings in the district court.

OPINIONS BELOW

The Fifth Circuit Court of Appeals issued no written opinion in this case.

The Memorandum Opinion of the United States District Court for the Northern District of Texas (Fitzwater, J.) has not been reported and is reprinted as Appendix A. Also unreported and attached as Appendices are the Preliminary Injunction issued by the district court (Appendix B), prior order of the district court denying the motions of Petitioner to compel arbitration and to stay further proceedings in the

district court (Appendix C), and the *per curiam* decision of the Fifth Circuit (Appendix D).

JURISDICTION

The judgment of the Fifth Circuit was entered on November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. § 3 Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4 Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing

that such arbitration proceed in the manner provided for in such agreement. * * *

STATEMENT OF THE CASE

This case arose on July 3, 1991, when Petitioner Frank C. Ruscitto ("Ruscitto") resigned as a broker for Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and began work as a broker for PaineWebber, Inc. Because Ruscitto was threatened by Merrill Lynch with action to enforce a covenant not to compete, he commenced an arbitration claim against Merrill Lynch pursuant to the rules and Constitution of the New York Stock Exchange ("NYSE").

On July 3, 1991, Ruscitto also filed this action under 9 U.S.C. § 4 in the United States District Court for the Northern District of Texas seeking to compel Merrill Lynch to submit to arbitration and to prevent Merrill Lynch from enjoining him under the non-compete clause pending NYSE proceedings which he had previously filed under the Federal Arbitration Act ("FAA").[1]

On July 8, 1991, Merrill Lynch filed a motion for a temporary restraining order and for a preliminary injunction in the district court, seeking equitable relief under the non-compete provisions of the agreement judicially rather than in the contracted for arbitration and as provided for in the FAA.

On July 9, 1991, the district court, without hearing, issued an order denying both the Merrill Lynch and Ruscitto applications for a temporary restraining order as well as the Ruscitto motions to compel arbitration and to stay. (Appendix C).

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[1] Jurisdiction was invoked pursuant to 28 U.S.C. § 1332 (diversity of citizenship). Ruscitto is a citizen of the State of Texas. Merrill Lynch is a Delaware corporation maintaining its principal place of business in the State of New York. The amount in controversy exceeds $50,000.00, exclusive of interest and costs.

After refusal by Merrill Lynch to accede to Ruscitto's specific requests for expedited arbitration before the NYSE, the district court entered a preliminary injunction against Ruscitto without hearing and without reference to any U. S. Supreme Court case addressing the issues herein raised. The court also issued a Memorandum Opinion which is steeped with specific factual determinations of significance on the merits.[2] (Appendix B).

The injunction as issued was anything but preliminary; it enjoined Ruscitto from doing business with any person with whom he had dealt while employed at Merrill Lynch (including literally his mother) for an entire year. It also restrained him for the maximum term of injunctive relief Merrill Lynch could seek under the non-compete agreement with Ruscitto, and exceeded even that relief which Merrill Lynch requested the court to grant. Additionally, the district court at the date of the filing of this petition still has retained jurisdiction of this matter and requires the parties to file periodic status reports to it (*see, e.g.*, Appendix E), which indicates that the court perceives its role has not ended as yet and that proceedings are still to continue under its thumb. The court also failed to order arbitration.

Ruscitto filed his appeal to the United States Court of Appeals for the Fifth Circuit. The former Merrill Lynch employee assigned as error the district court failure to enforce the valid terms of the agreement of the parties to arbitrate, which as a matter of law precluded court ordered injunctive relief under the express terms of the FAA and relevant case law. He further assigned as error the district court refusal to compel arbitration of the dispute and to stay further proceedings.

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[2] For example, the district court by implication found the non-compete clause to be binding and enforceable. That is clearly not the case under Texas law. *See, e.g., Travel Masters, Inc. v. Star Tours, Inc.*, 35 Tex. Sup. Ct. J. 254 (Dec. 18, 1991); *DeSantis v. Wackenhut*, 793 S.W. 2d 670 (Tex. 1990).

Following expedited briefing and argument, the Fifth Circuit issued its *per curiam* decision affirming the lower court's order. (Appendix D). Petitioner now seeks a writ of certiorari in light of the erroneous district court interpretation of the FAA in its Memorandum Opinion and Preliminary Injunction, and the erroneous, albeit concise, approval by the Fifth Circuit of the district court decision.

REASONS FOR GRANTING THE WRIT

The Court may recall that seven years ago the issue of whether Section 3 of the FAA precludes a court from issuing a preliminary injunction in favor of Merrill Lynch pending arbitration of a contractual dispute was brought forth on petition for writ of certiorari. *See, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127 (1985). Since then a plethora of less than uniform decisions have been rendered which continue to fuel the present confusion in the law on this issue. Justices White and Blackmun in their dissent to the denial of the prior writ explicitly adopted the position which is being proffered by this petition for a writ of certiorari and which they expressed as follows:

> Whether the Arbitration Act bars the issuance of a preliminary injunction pending arbitration appears to be a frequently litigated question of considerable importance to the parties to arbitration agreements. The issue is one well worth definitive resolution by this Court.

McCollum, 469 U.S. at 1129 (White, J. dissenting from denial of cert., Blackmun, J. joining).[3]

How prescient their statement was. Since this Court denied Merrill Lynch's prior petition for certiorari in early 1985, an overwhelming number of federal and state courts in

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[3] A copy of the dissent of Justice White is attached hereto as Appendix G.

like proceedings, many involving Merrill Lynch, have been forced to consider that same issue presented for review in *McCollum*, and presented again in the case at bar. *See*, Appendix F. The question still remains unresolved and because of its importance still is creating significant case load for the courts.

Additionally, Petitioner agrees wholeheartedly with the Merrill Lynch statement in its earlier petition for certiorari filed in *McCollum*, that "[t]his question of statutory construction is of critical importance . . . ."[4], and submits that it is certainly ripe for determination at this time.

The particular reasons urged by Petitioner for the Court to exercise its discretion to grant a writ of certiorari include:

> 1) conflict between the Fifth Circuit Court of Appeals and the applicable decisions of this Court on the federal issue here presented;
>
> 2) conflict among various United States courts of appeals on the same matter as here presented;
>
> 3) a conflict between the Fifth Circuit Court of Appeals and the Texas court of last resort on the federal issue here presented;
>
> 4) a conflict among the state courts on the federal issue here presented; and,
>
> 5) the paramount issue of whether the federal courts should be required to adjudicate, at the preliminary stage, hundreds of arbitrable disputes.
>
> S. Ct. R. 10 (a-c). Each of these grounds is legitimate and of sufficient measure to invoke herein the review of this Court; for this reason, Ruscitto urges that the Court grant his petition for writ of certiorari and finally determine the matter at hand.

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[4] Petition for Writ of Certiorari, filed by Merrill Lynch in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, October Term 1984, at 14.

I. *The Fifth Circuit opinion is contrary to the express terms of the FAA and its statutory intent as expressed by the United States Supreme Court.*

In light of the express and unambiguous terms of the FAA and this Court's decisions interpreting that statute in other scenarios, it is puzzling that both the federal and state courts have been so divided in their holdings as to whether arbitration is the forum to determine the issue of injunctive relief in instances where there is pending contract-based arbitration of a dispute. As Petitioner ardently argued to the Fifth Circuit, where there is a binding contract to arbitrate, Sections 3 and 4 of the FAA and a forthright analysis of appurtenant Supreme Court cases should be dispositive of that issue.[5]

In enacting the FAA, Congress ensured the enforceability of arbitration agreements by divesting the district courts of all decision making over disputes covered by written arbitration agreements, save the issue of whether there is an agreement to arbitrate. Sections 3 and 4 of the FAA provide, in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court* in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added).

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[5] There is no controversy in this instance that there is a binding predispute agreement to arbitrate the employment contract between the parties under the FAA. *See, e.g.*, NYSE Arbitration Rule 347, attached hereto as Appendix H.

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court, which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . .

9 U.S.C. § 4.

There is no disagreement between the parties as to the exclusive purview of the arbitrators in this matter to determine the contractual dispute between them with this one exception: Respondents would contend that the agreement to arbitrate contract-based claims under the FAA does not preclude the district court from entering injunctive orders pending arbitration; Ruscitto respectfully disagrees.

In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), this Court recognized that:

> Congress' clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute *out of court* and into arbitration *as quickly and easily as possible.*

Moses H. Cone, 460 U.S. at 22 (emphasis added). It further stated in *Gilmer v. Interstate/Johnson Lane Corp.*, __ U.S. __, 111 S. Ct. 1647, 1657 (1991), that the FAA:

> reflects a "liberal federal policy favoring arbitration agreements." *Mitsubishi* 473 U.S., at 625, 105 S. Ct. at 3353.

As to the enforcement of such provisions to arbitrate, this Court has held that upon a determination that the parties have agreed to arbitrate their disputes, the district courts are barred not only from delving into the merits or considering the equities of a particular claim, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1959), but are barred from

even determining procedural questions which grow out of the dispute and bear on its final disposition. *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964).

The Court in *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 394 (1976), specifically discusses the power of a district court to enter injunctive relief pending arbitration. Recognizing that consideration at the preliminary injunction stage of any disputed facts or issues by the court is disruptive of the whole arbitration process, the Court upheld the denial by the district court to grant an injunction where there was a binding agreement to arbitrate, because:

> [T]he parties' agreement to adjust or to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage.

Buffalo Forge, 428 U.S. at 411-12.

There are also a myriad of cases which have been determined by this Court concerning the issue of whether an agreement to arbitrate a contract-based claim precludes subsequent judicial resolution of statutory claims growing out of the same factual scenario. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.,* ___ U.S. ___, 111 S. Ct. 1647 (1991); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987); *Barrentine v. Arkansas-Best Freight Systems,* 450 U.S. 728 (1981); *McDonald v. City of West Branch, Michigan,* 466 U.S. 284 (1984). Likewise, there are numerous disparate lower court interpretations of the law as to whether an agreement to arbitrate a contract-based claim under the FAA bars pre-arbitration judicial resolution of equitable issues growing out of that same contract (see Appendix F). Yet, there is presently no Supreme Court decision which has specifically interpreted the FAA as to the question here presented. Although analysis and the criteria of various Supreme Court cases concerning arbitration disputes where statutory issues

exist shed light, there is certainly ample uncertainty from the case law to implore a determination by this Court of the particular issue of judicial pre-arbitration intervention in these types of cases.

The judicially mandated injunction which Merrill Lynch will attempt to uphold in this appeal rises out of the terms of its contract with Ruscitto which incorporates the rules of the NYSE and specifies arbitration pursuant to the FAA. The determination here to be made is the scope of the FAA and whether judicial remedies are also available to parties arbitrating thereunder. Petitioner would submit that the clear statutory intent of the FAA has been held by this Court on every occasion reviewed to empower the arbitrators with exclusive enforcement of the contract *per se* and to deny the availability of the courts to resolve any disputes under such agreement. Indeed, exceptions to the non-availability of judicial remedies doctrine under the FAA have been specifically limited by this Court to instances where congressional intent is expressed in particular legislation to preclude the waiver of one's judicial remedies for the interpretation and enforcement thereof.

As recently expressed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriquez de Quijas, v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991); and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), even where there are statutory claims in addition to the contract dispute to be considered, if the claims arise out of a particular transaction which is subject to an arbitration agreement, the agreement to arbitrate, absent specific congressional intent otherwise as to the statutory issues, exclusively controls determination of both the statutory and common law claims. Merrill Lynch has somehow convinced numerous lower courts that an agreement to

arbitrate under the FAA does not include the exclusive selection of the arbitral forum to hear all of the contractual issues raised by the agreement (see Appendix F); it has done so apparently by convincing the lower court that, insofar as pre-arbitration injunctions are concerned, holding Merrill Lynch strictly to its "selection of an arbitral rather than a judicial forum" under its "bargain to arbitrate" as required by *Mitsubishi*, 473 U.S. at 628, somehow undermines the role of the courts.

Yet the FAA, which is the single Congressional statute upon which the courts must rely in this instance, in no way protects parties subject thereto from waiving their respective rights to judicial remedies thereunder. And, this Court has consistently adopted the position that "the question of whether the statutory right may be waived depends upon the *intention of Congress* as manifested in *the particular statute.*" *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705 (1945) (emphasis added). Diligent search by Petitioner has yet to turn up either an agreement of the parties, a rule of the NYSE, such "Congressional intent", or a "particular statute" which excludes determination of equitable pre-arbitration issues from being exclusively within the arbitral remedies of the forum selected by the parties under the rules of the NYSE and the FAA.

To the contrary, *Gilmer*, which was cited to the Fifth Circuit by Petitioner, specifically holds that the NYSE rules do not restrict the types of relief an arbitration panel may award and that the "arbitrators do have the power to fashion equitable relief." *Gilmer*, 111 S. Ct. at 1655. By agreeing to be bound by these NYSE rules, the Court found that Gilmer was required to arbitrate all of his equitable claims even though some arose statutorily from without the contract. Yet, for reasons unknown, the court below and numerous other trial courts have carved out an exception to the apparent exclusive equity jurisdiction conferred by the statute on the arbitrators;

one must assume this is based upon a trial court misconception that somehow there is available a common law or statutory judicial remedy when there is a pending NYSE arbitration under the FAA. Petitioner can find no authority from this Court which sustains such holdings.

The action of the courts in this instance in light of these cases should provide sufficient basis for Supreme Court determination of the issue here presented in order to preserve order in the courts and to resolve conflicts between the U.S. Supreme Court and the courts of appeals.

II. There is a clear split among the circuit courts on the issue of a court's authority to issue injunctive relief in a suit subject to arbitration.

Petitioner urges that stock brokers such as he do not have a union to attack the issue raised here for the profession as a whole; but he would submit that he now understands that a broker's ability to have his employment contract fully arbitrated may today depend upon where he works. This is so because the question presented by this case and previously by *McCollum* is one that has so widely divided such a number of both the state and federal courts, and that it will not be put to rest until specifically addressed by this Court.

The Eighth and Tenth Circuits have adopted Petitioner's position that preliminary injunctive relief from the federal or state courts is unavailable in a case where there is a preexisting agreement to arbitrate. *See, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott*, No. 83-1480 (10th Cir., May 12, 1983) (unpublished order). *See, also, Merrill Lynch, Pierce, Fenner & Smith v. DeCaro*, 557 F. Supp. 616 (W.D. Mo. 1983) (holding not only that the merits are for the arbitrator to decide, but also that the arbitrator has the power to issue injunctive relief); *Merrill Lynch, Pierce, Fenner & Smith v. Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983).

In the often-cited case of *Hovey*, the Eighth Circuit, upon review of all of the relevant Supreme Court cases, held as follows:

> We find this compelling authority to hold that, where the Arbitration Act is applicable and no qualifying contractual language has been alleged, the district court errs in granting injunctive relief. In doing so, we sustain not only "the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.*, 388 U.S. at 404, 87 S.Ct. at 1806.

Hovey, 726 F.2d at 1292.

The Fifth Circuit, by its one-word affirmance of the district court's opinion and order in this case, has, in essence, aligned with the First, Second, Third, Fourth, Seventh, and Ninth Circuits in their conclusion that a court may, despite the language of the FAA, inject itself into arbitration proceedings where valid predispute agreements to arbitrate exist and thereby permit injunctive relief to be obtained from a different forum. *See, Teradyne Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986); *Blumenthal and Fein v. Merrill Lynch, Pierce, Fenner & Smith*, 910 F.2d 1049 (2nd Cir. 1990); *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806 (3rd Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith v. Bradley*, 756 F.2d 1048 (4th Cir. 1985); *Sauer-Getribe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983), *cert. denied*, 764 U.S. 1070 (1984); *PMS Distributing Company, Inc. v. Huber*, 863 F.2d 639 (9th Cir. 1988).[6]

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[6] As would be expected, within these circuits there are numerous district court decisions which also so hold.

Each of these holdings is grounded upon the faulty premise that issuance of a court ordered injunction merely preserves the status quo pending arbitration; to the contrary, when these decisions approve the making of preemptive determinations on the merits that Merrill Lynch's agreement is worthy of specific enforcement, they have the potential of rendering the arbitration a nullity. That possible underlying cause for litigants such as Merrill Lynch to pursue judicial determinations as to injunctive relief in these cases was realized early on by this Court, and its reasoning is pointedly applicable here:

> It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contract(s) if this procedure is to be permitted. Injunctions against strikes, even temporary injunctions very often permanently settle the issue; and in other contexts time and expense would be discouraging factors to the losing party in court in considering whether to relitigate the issue before the arbitrator.

Buffalo Forge, 428 U.S. at 412.

There is no doubt that the United States courts of appeals have rendered conflicting opinions on the issue at hand, and this is stated by S.Ct. R. 10 as being of the character of reasons to be considered in determining review of the issue by this Court. But there are certainly other supportive reasons giving credence to the granting of a writ of certiorari based upon that premise. Appendix F is only a partial listing of cases, a great majority of which have been decided since this Court previously reviewed this question, each of which specifically addresses this issue of the availability of judicially mandated preliminary injunctive relief where there was a contract which mandated arbitration. This plethora of conflicting authority should leave no doubt in one's mind that

this "is a frequently litigated question of considerable importance to the parties to arbitration agreements" and "worth definitive resolution by this Court." *McCollum* dissent, 469 U.S. at 814. Also, this Court has ruled since *McCollum* was decided in 1985, specifically that arbitrators "have the power to fashion equitable relief" and under NYSE rules may award equitable remedies as "damages and/or other relief", *Gilmer*, 111 S. Ct. at 1655; this issue is among those respectively disputed in the appended lower court holdings.

This brings the question of why this Court should review the issue presented in this controversy more into focus and gives added impetus to the statement in the dissent of Justice Frankfurter in *Wilko v. Swan*, 346 U.S. 427 (1953) as adopted in *Rodrigues de Quijas*, 490 U.S. at 483, where he stated:

> There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled.

Yet, if the conflict between the circuits is not disposed of here, this statement is untrue. Under the congressionally mandated arbitral system, everyone is supposedly entitled to the same "rights"; with a split in the circuits on such a basic issue, without guidance from this Court, some persons who contracted for arbitration of their dispute *a priori* will be denied their right to a proper forum. The issue is beyond rectifying at this point without Supreme Court consideration and for that reason writ should be granted.

III. There is a clear split between the Texas courts and the Fifth Circuit on the issue of a court's authority to issue injunctive relief in a suit subject to arbitration.

As the Court is aware from its earlier consideration of the *McCollum* case, the Texas state courts have expressly rejected the notion that a party can seek judicial injunctive relief in the face of a binding agreement to arbitrate. *Merrill*

Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W. 2d 604 (Tex. App. — Houston [14th Dist.], writ ref'd n.r.e.), *cert. denied*, 469 U.S. 1127, *reh'g denied*, 470 U.S. 1024 (1985). *See, also, Merrill Lynch, Pierce, Fenner & Smith v. Maghsoudi*, 682 S.W. 2d 593 (Tex. App. — Houston [1st Dist.] 1984, no writ). The Texas Supreme Court has to date not modified its position from that in the *McCollum* case and now the Fifth Circuit, which has appellate review over the federal district courts in Texas, is polarized from the state courts on this issue. The dilemma in which this places citizens of this state is obvious: different court, different results as a matter of law. Since there is an unavoidable conflict created specifically by this case between the Texas law as it relates to a federal question and the United States court of appeals for that state, it is now even more critical to numerous citizens, especially of that state, for this Court to dispel the conflict by rendering a decision on the merits herein.

IV. There is a clear split among the state courts on the issue of a court's authority to issue injunctive relief in a suit subject to arbitration.

There is further conflict among the states on the federal issue of whether the FAA bars the issuance of a preliminary injunction pending arbitration. The Delaware and Louisiana state courts, as the Texas courts, have followed the rationale of *Hovey* in their refusal to grant injunctive relief in the face of a binding agreement to arbitrate. *See, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ray*, No. 83-CC-2171 (La. Oct. 20, 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McLaughlin*, No. 7948, 1985 WL 11538 (Del. Ch. Feb. 20, 1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shin*, No. 7424, 1984 WL 8203 (Del. Ch. Jan. 12, 1984). *But cf., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Price*, No. 11097, 1989 WL 108412 (Del. Ch. Sept. 13, 1989).

On the other hand, state courts in Colorado and Florida, in direct conflict with the Texas, Louisiana, and Delaware

state courts, have specifically held that they have authority to issue injunctive relief in a dispute subject to arbitration. *See, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court,* 672 P.2d 1015 (Colo. 1983); *Korn v. Ambassador Homes, Inc.,* 546 So.2d 756 (Fla. Dist. Ct. App. 1989). *See, also, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moose,* 528 A.2d 1351 (Pa. Super. Ct. 1987), in which a Pennsylvania court, with no discussion regarding the propriety of injunctions pending arbitration, granted such an injunction at the time it determined the matter to be arbitrable.

The massive conflict on the issue of a court's authority to issue preliminary relief in a case subject to arbitration, not only among and between the various state and federal courts but between these courts and those seeking proper application of the controlling decisions of the U.S. Supreme Court, mandates immediate consideration and resolution of this issue by the Court.

V. The authority to issue injunctive relief in a suit subject to arbitration is an important issue which should be settled.

As seen from the numerous cases cited in this petition in which the question of judicial authority to render injunctive relief in a suit subject to arbitration has been directly discussed (see Appendix F), this issue has been, and unless finally determined will remain, a costly issue of paramount importance to many brokers in numerous disputes. In this cause, as in most of the other cases cited, the injunction entered by the district court in essence has had the effect of depriving the former employee of his job as well as his contractual right to arbitrate his total dispute timely.

The NYSE provides for expedited arbitration upon agreement of the parties. Merrill Lynch here would not so agree, and thereby was able to bring about piecemeal determination of these contractual issues which caused the matter to

lapse into a protracted proceeding and gave Merrill Lynch the distinct upper hand which it sought.

This is hardly "status quo"; indeed it is this gaining of advantage which is the integral ingredient driving Merrill Lynch to pursue these injunctions, not that of maintaining status quo. Justice White in his *McCollum* dissent stated that the determination of this issue is of "considerable importance"; Petitioner merely wants to assure this Court that such a determination is *extremely* important to him as well as to other brokers so situated and the numerous former Merrill Lynch employees who have been forced to expend the untold sums necessary to pursue a resolution of this issue.

VI. The issues herein are potentially capable of repetition, yet evading review.

The doctrine of cases presenting issues "capable of repetition, yet evading review" pertains to instances where proceedings may have begun and ended before the Court has opportunity to resolve the issue. It permits judicial review in such instances where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see, also, McCollum*, 469 U.S. at 814.

Petitioner does not know when or if the issue of the temporary injunction which is the subject of this case will be considered by this Court. However, as in *McCollum*, the arbitration proceedings herein are going forward and there is some evidence that a hearing disposing of the matter in arbitration may transpire prior to its consideration by this Court. If that occurs, unless this doctrine is invoked, the issue here presented likely never will be conclusively resolved.

The likelihood that Ruscitto (and any broker so situated) may reasonably expect again to be subjected to challenging

injunctive relief pending arbitration with an employer is an obvious occupational hazard for him so long as this case has not been ruled upon and he is employed in the stock brokerage business subject to the NYSE rules. Certainly Merrill Lynch, as this Court has previously held in *McCollum*, also will likely find itself in this repetitious position. Indeed, this is the second appeal involving Merrill Lynch to this Court on this issue since 1985, and the numerous cases in which it was a party cited in Appendix F were repetitious of the same issue raised in both instances.

Even though the cases state that the rule anticipates the capability of repetition being applicable to a "complaining party", such a limitation would not seem to conform with the purpose for this legal tenet to override the issue of mootness. The Court surely does not intend to couch the applicability of this precept in terms of whether a party won or lost in the court below. Even though there is sufficient potential for repetition which attaches to Petitioner, such test should apply likewise to Merrill Lynch in this instance solely because of the legitimacy of the repetition issue as it applies to that entity, and not whether it is strictly the complaining party.[7]

This question is also capable of repetition not only by both parties hereto, but by the new employer of Ruscitto, PaineWebber, Inc., which has now been joined by Merrill Lynch in the arbitration proceedings and which has a real interest in these proceedings. Petitioner submits that under the parameters of *McCollum*, the tests of "capable of repetition, yet evading review" are certainly sufficiently met in this

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[7] *See, e.g.*, the three cases raising this same issue in the N.D. of Texas within a few months of this cause and which demonstrate the capability for repetition as to brokers and as to Merrill Lynch. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scheff*, CA3-91-0877G (N.D. Tex. 1991); *Arsenault v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, CA3-91-1131G (N.D. Tex. 1991); and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Leach*, CA3-91-1023-T (N.D. Tex. 1991).

instance and should not be cause for the Court to deny its writ.

VII. Denial of expedited arbitration upon the grant of preliminary injunctive relief deprives a party of its right to arbitrate the merits of a dispute.

Although Petitioner urges the Court to find that the terms of the FAA preclude the courts from issuing pre-injunctive relief at all, Petitioner also asks that the Court grant writ of certiorari to consider an alternative solution to be raised by Petitioner of requiring, at a minimum, that the trial court mandate expedited arbitration when a preliminary injunction is granted by the court.

After seven months of delay, today there still has been no arbitration in this case and Ruscitto's right to arbitrate the validity of Merrill Lynch's non-compete agreement has been eviscerated by the actions of the district and Fifth Circuit courts. The non-compete agreement purports to prohibit Ruscitto from competing with Merrill Lynch for a period of one year; the court's order has had the effect of a decree of specific performance of Merrill Lynch's non-compete agreement, without any adjudication of this dispute on the merits by the arbitrators, or a hearing in *any* forum.

Petitioner would argue that, at the least, upon issuance of injunctive relief by a state or district court, the Congressional intent behind the FAA to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" *Moses H. Cone*, 460 U.S. at 22, mandates that as a *quid pro quo* a court issuing injunctive relief also order expedited arbitration to thwart the attempts by either party to delay the timing of the arbitration and proper consideration by the arbitrators of the issues at hand. *See, Blumenthal and Fein v. Merrill Lynch*, 910 F. 2d 1049 (2nd Cir. 1990) (noting lower court ordered expedited arbitration).

There being no opinion in this case discussing this issue raised at both the trial court and appellate court levels, Petitioner requests that this Court permit him to present same to this Court by granting his writ herein requested.

CONCLUSION

Ruscitto and Merrill Lynch had a valid predispute agreement to arbitrate under the rules of the NYSE all issues arising between them pursuant to an employment contract. Neither has challenged the efficacy of the rules or agreement which form the basis of their legal relationship. The single issue which has been presented by this petition is whether the Federal Arbitration Act precludes a court from issuing a temporary injunction pending arbitration of a contractual dispute.

This issue has created splits among the various United States courts of appeals, state and federal courts, state courts, and lurks in the periphery of a number of U.S. Supreme Court decisions. The question has been virtually omnipresent somewhere in our court systems for the last seven years since this Court refused writ in *McCollum;* this emphasizes both the frequency of its being challenged as well as the importance of the issue to parties to arbitration contracts.

The duration of this proceeding and reasonable expectation that both parties hereto may be subjected to such action again substantiates the application by the Court of the "capable of repetition, yet evading review" doctrine which supersedes the issue of mootness in this case.

With the emphasis in the federal court system on arbitration and the recognition of the increased quality of the procedures and effectiveness of that system in settling disputes, these wide spread splits in authority cannot be permitted to continue. If it is to preserve the effectiveness of such a system, this Court must eliminate obvious impediments to its proper and consistent functioning.

The conclusion of this brief, therefore, is facile. This Court, to preserve order in future proceedings in arbitration, must grant this petition and decide the merits of this case. To do otherwise will thwart Congressional mandate, impede the primacy of arbitration, and encourage disingenuous use of our court system.

Respectfully submitted,

Joe H. Staley, Jr.
State Bar No. 19017000
Margaret A. Donahue
State Bar No. 05968450

LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8000
(214) 740-8800 — FAX

Attorneys for Appellant,
FRANK C. RUSCITTO

APPENDIX A

MEMORANDUM OPINION [OF AUGUST 2, 1991]

[United States District Court — Northern District of Texas — Dallas Division]

[Filed August 2, 1991]

(Frank C. Ruscitto, Plaintiff, v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendant — CA3-92-1312-D; Entered on Docket pursuant to F.R.C.P. Rules 58 and 79a)

Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc., ("Merrill Lynch") applies for a preliminary injunction precluding plaintiff Frank C. Ruscitto ("Ruscitto"), a former account executive employed by Merrill Lynch, from soliciting and accepting business from certain clients whom he served while a Merrill Lynch account executive and using, disclosing, or transmitting certain information contained in Merrill Lynch records. For the reasons that follow, *see* Fed. R. Civ. P. 65(d) and 52(a), the court grants the motion.

I

Plaintiff Ruscitto resigned from employment with defendant Merrill Lynch on July 3, 1991 and went to work immediately for a Merrill Lynch competitor, PaineWebber, Inc. ("PaineWebber"). On the day he resigned, he sent letters to customers whom he had served at Merrill Lynch, soliciting their brokerage business. *E.g.*, July 10, 1991 Affidavit of Wilbur R. Monier, Ex. A. The letter informed the customer that Ruscitto would "continue my business association with you through the brokerage firm PaineWebber." *Id.*

Ruscitto is a 47-year old resident of Dallas County, Texas. July 3, 1991 Affidavit of Frank C. Ruscitto at ¶3. He went to work for Merrill Lynch in August 1987 at its Las Colinas, Texas branch office. *Id.* at ¶4. Ruscitto had been a

broker with EFHutton ("Hutton") from 1969-1974. July 22, 1991 Affidavit of Frank C. Ruscitto at ¶3. Thereafter, he was employed in the Trust Department of Mercantile National Bank ("Mercantile") for 13 years before commencing employment with Merrill Lynch. *Id.* at ¶¶3-4.

When Ruscitto commenced his employment with Merrill Lynch, he executed an Account Executive Trainee Agreement (the "Agreement").[1] Mem. Supp. Mot. Prel. Inj. Ex. A. The Agreement contains two provisions on which Merrill Lynch now relies in part for the preliminary injunction it seeks. The provisions state:

> 1. All records of Merrill Lynch, including the names and addresses of its clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch and after termination of my employment for any reason with Merrill Lynch. None of said records nor any part of them is to be removed by me from the premises of Merrill Lynch either in original form or in duplicated or copied form, and the names, addresses, and other facts in such records are not to be transmitted verbally or in writing by me except in the ordinary course of conducting business for Merrill Lynch. All of said records or any part of them are the sole proprietary information of Merrill I ynch and shall he treated by me as confidential information of Merrill Lynch.

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[1] In one of his affidavits in opposition to the preliminary injunction application, Ruscitto avers that "it is my strong belief that any such written agreement with Merrill Lynch was only for a two-year term, it expired by its own terms, and thus is no longer binding upon me." Ruscitto Aff. (July 3, 1991) at ¶4. This allegation does not present a controlling credibility question that requires an evidentiary hearing. Ruscitto neither questions the authenticity of the Agreement nor of his signature. The Agreement contains no provision that dictates the entire agreement expires after two years. Only ¶3 — a clause irrelevant to Merrill Lynch's application — has a two-year term.

2. In the event of termination of my services with Merrill Lynch for any reason, I will not solicit, for a period of one year from the date of termination of my employment in any community or city served by the office of Merrill Lynch, or any subsidiary thereof, at which I was employed at any time, any of the clients of Merrill Lynch whom I served or whose names became known to me while in the employ of Merrill Lynch. In the event that any of the provisions contained in this paragraph and/or paragraph (1) above are violated I understand that I will be liable to Merrill Lynch for any damage caused thereby.

Merrill Lynch contends Ruscitto is violating ¶2 of the Agreement by soliciting 300-450 clients he serviced at Merrill Lynch, which represent over $28 million in assets managed by the defendant and $370,000 in commissions for Merrill Lynch in 1990. *See* July 8, 1991 Affidavit of Wilbur R. Monier at ¶4. Merrill Lynch argues Ruscitto is violating ¶1 of the Agreement by taking, using, and disseminating information concerning these customers, including their names, addresses, past investment activities, current status of their investments, and holdings. It seeks a preliminary injunction (1) precluding Ruscitto from soliciting business from certain clients of Merrill Lynch whom Ruscitto served while in Merrill Lynch's employ and from accepting business from any customers whom Ruscitto has solicited in the past for the purpose of doing business with Merrill Lynch and (2) preventing Ruscitto from using, disclosing, or transmitting information contained in certain records of Merrill Lynch.

Ruscitto opposes the application, arguing Merrill Lynch is not entitled to injunctive relief because the parties have entered into an agreement that compels them to arbitrate their dispute, Merrill Lynch cannot satisfy the elements required for entry of a preliminary injunction, Merrill Lynch

has unclean hands, and a preliminary injunction will confer upon Merrill Lynch all the relief it seeks.

II

A

At the outset, the court turns to a procedural question. Because Ruscitto filed suit against Merrill Lynch in anticipation of relief he thought Merrill Lynch would pursue in court, Merrill Lynch is the defendant in this action. According to the clerk's office, as of today Merrill Lynch has yet to file a counterclaim against Ruscitto. As the court notes below, in the Fifth Circuit the first inquiry for determining entitlement to a preliminary injunction is whether the applicant has shown a likelihood of success on the merits. Indeed, Merrill Lynch predictably contends in its application "that there exists a substantial likelihood that Merrill Lynch will succeed on the merits of its claims against the Plaintiff." Mem. Supp. Mot. Prel. Inj. at 6-7. But because Merrill Lynch has not filed a counterclaim, the question arises whether it procedurally has identified "its claims."

There is scant authority on the question, but the court is satisfied from its research that Merrill Lynch need not have filed a counterclaim. At least one circuit court has held there are circumstances of such an exigent nature that an injunction can precede even the filing of the suit itself. In *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966), the Second Circuit affirmed an injunction entered by the district court on the basis of an affidavit and without a complaint. *Id.* at 694. The circuit court observed that "it would have been better to file a complaint along with the affidavit and order to show cause," *id.*, but under the circumstances (a complaint was filed after the hearing but before the injunction issued), the district court could properly treat the affidavit as a complaint. *Id.* Professors Wright and Miller state as the applicable rule that, "although it is preferable to file the complaint first, a

preliminary injunction may be granted upon a motion made before a formal complaint is presented." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2949 at 468(1973).

In the present case Merrill Lynch's motion and associated briefing make pellucid the precise relief it seeks and the bases it contends warrant such relief. The lack of a counterclaim therefore presents no impediment. Merrill Lynch shall file its counterclaim promptly.

B

A second preliminary question is more difficult. Ruscitto argues with some force that this court should not enter a preliminary injunction because the parties are obligated to arbitrate their dispute before the New York Stock Exchange ("NYSE"). He contends 9 U.S.C. § 3, which is part of the Federal Arbitration Act, mandates a stay of all proceedings until arbitration is completed or a party fails to arbitrate. He points to NYSE Arbitration R. 347, which also mandates arbitration in cases such as the present one, see 2 N.Y.S.E. Guide (CCH) ¶2347 (Sept. 1988), and to § 8(a) of the Code of Arbitration of the National Association of Securities Dealers Inc., which contains a similar provision.

The court recognizes there is a split of authority among the circuits that have decided the question whether 9 U.S.C. § 3 precludes entry of an injunction in a case where the underlying dispute is plainly covered by a mandatory arbitration agreement. The Fifth Circuit has not expressly addressed the question and even federal and state judges within Texas have reached conflicting results. The court is persuaded by its reading of the cases, and by Judge Feldman's thoughtful opinion in *Speedee Oil Change Sys., Inc. v. State Street Capital, Inc.*, 727 F.Supp. 289 (E.D. La. 1989), that the Fifth Circuit will ultimately opt for the majority view and decide that a preliminary injunction can be entered to preserve the status quo during the process of arbitration. *See id.* at 292. Accordingly,

the court holds that a preliminary injunction that does nothing more than preserve the status quo does not run afoul of 9 U.S.C. § 3.

III

The court now turns to consideration of the merits of Merrill Lynch's application. The formulation of *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974), is familiar. In order to show entitlement to a preliminary injunction, Merrill Lynch must demonstrate (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable harm, (3) the threatened injury to Merrill Lynch outweighs the threatened harm to Ruscitto if injunctive relief is granted, and (4) granting the injunction will not disserve the public interest.

A

To decide the question of likelihood of success, the court must first ascertain the controlling substantive law. Merrill Lynch argues the merits of its application on the basis of numerous cases throughout the United States that have awarded it injunctive relief on a variety of grounds. Notwithstanding the numerical weight of the cases, most have no application here. As Ruscitto properly points out, the Agreement and applicable common law jurisprudence are governed by Texas choice of law rules, which apply Texas law to the instant facts. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 679 (Tex. 1990) (on rehearing), *cert. denied*, ___ U.S. ___, 111 S.Ct. 755 (1991). The vast majority of the cases on which Merrill Lynch now relies do not apply Texas law. This is not a situation, then, where Merrill Lynch can simply point to the succession of courts that have already traveled a particular course and urge this court to do likewise.

In the late 1980s, the Texas courts turned a cold shoulder to enforcement of covenants not to compete. *See Property*

Tax Assocs., Inc. v. Staffeld, 800 S.W.2d 349, 351 (Tex. App. 1990, writ denied) ("Since the *Hill [v. Mobile Auto Trim. Inc.*, 725 S.W.2d 168 (Tex. 1987)] decision, those seeking to enforce covenants not to compete have not been very successful in [the Texas Supreme Court]"). But the Texas legislature changed this attitude with the enactment effective August 28, 1989 of Tex. Bus. & Comm. Code Ann. §§ 15.50 and 15.51 (Vernon Supp. 1991). Under these standards, a covenant not to compete is enforceable to the extent (1) it is ancillary to an otherwise enforceable agreement[2] and (2) contains reasonable limitations as to the time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee. *Id.* § 15.50. A court may award the promisee injunctive relief for a breach of the covenant. *Id.* § 15.51(a).

The applicability of § 15.50 to an agreement not to compete that was entered into before the statute was enacted was left undecided by the Texas Supreme Court in *DeSantis*. *See* 793 S.W.2d at 685. But a Texas intermediate court held three weeks after *DeSantis* that the statute does apply if the *breach* of a covenant not to compete occurs after August 28, 1989. *See Webb v. Hartman Newspapers, Inc.*, 793 S.W.2d 302, 304 (Tex. App. 1990, no writ); *accord* Property Tax Assocs., 800 S.W.2d at 352 (applying statute to covenant executed January 5, 1988). The new law applies to today's case.

Under the statute, the court first determines if the covenant is ancillary to an otherwise enforceable agreement. In the present case the first test is met; the covenant was part of Ruscitto's agreement to become employed with Merrill Lynch.

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[2] If the covenant is executed on a date other than the date on which the underlying agreement is executed, the covenant must be supported by independent valuable consideration. *Id.* § 15.50(1).

"Once the first criteri[on] is met, the courts have no choice but to enforce the covenant if the promisee seeks reasonable enforcement." *Id.* at 350. The present record plainly shows that Merrill Lynch's request is reasonable. Ruscitto may continue to compete as a stock broker in the same locale. He is merely restricted for one year from soliciting clients whom he served or whose names became known to him while at Merrill Lynch. The duration of the covenant is plainly reasonable under Texas law, as is the prohibition upon use of records and customer information.

Merrill Lynch is likely to succeed on the merits of its claims.

B

The court next considers the element of irreparable injury. Under Texas law, covenants not to compete present the paradigm of irreparable injury, so that reasonable enforcement appears to be the rule rather than the exception. Tex. Bus. & Comm. Code Ann. § 15.51(a) expressly makes available injunctive relief. The factual record supports a finding that Merrill Lynch is threatened with irreparable injury by Ruscitto's breach of the Agreement.

C

The court determines next that the threat of injury to Merrill Lynch outweighs the threat of injury to Ruscitto. The court rejects the facile temptation simply to compare the corporate employer with the individual former employee and to balance the harm only with reference to their correlative financial standing. To do so would almost always dictate a ruling against the corporate behemoth. The proper equation is surely otherwise, balancing instead the terms and breadth of the injunction contemplated against the threatened harm if equitable relief does not issue.

Here, Ruscitto will be permitted to pursue his current profession and to compete with Merrill Lynch in the very community in which he has long-resided. Although the restrictions on him will be meaningful, the harm they exact does not outweigh what Merrill Lynch will incur in terms of lost customer goodwill, trade secrets, and lost business.

D

The entry of a preliminary injunction will not disserve the public interest.

IV

The court has carefully considered Ruscitto's clean hands argument as well as his contention that a preliminary injunction will accord Merrill Lynch all the relief it seeks. The court is not persuaded that either contention warrants denial of injunctive relief.

* * *

The application for a preliminary injunction is granted for the reasons stated.

August 2, 1991.

/s/ SIDNEY A. FITZWATER

United States District Judge

APPENDIX B

PRELIMINARY INJUNCTION [OF AUGUST 2, 1991]

[United States District Court —
Northern District of Texas — Dallas Division]

[Filed August 2, 1991]

(Frank C. Ruscitto, Plaintiff, v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendant — CA3-92-1312-D)

For the reasons set out in a memorandum opinion filed today, it is ordered and adjudged that plaintiff Frank C. Ruscitto ("Ruscitto"), his agents, servants, employees, attorneys, and persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are enjoined pending further order of this court, and until no later than July 2, 1992, from

(1) soliciting any business from any client of defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") whom Ruscitto served or whose name became known to Ruscitto while in the employ of Merrill Lynch, and from accepting any business from any of said clients; and

(2) using, disclosing, or transmitting information contained in the records of Merrill Lynch, including but not limited to, the names, addresses, and financial information of such clients, and failing immediately to return any original records to Merrill Lynch.

This preliminary injunction shall take effect immediately upon Merrill Lynch's posting with the clerk of court, cash or a bond (in a form approved by the clerk of court) in the sum of $50,000.

SO ORDERED.

August 2, 1991.

/s/ SIDNEY A. FITZWATER

United States District Judge

APPENDIX C

ORDER DENYING RUSCITTO'S MOTIONS FOR TEMPORARY RESTRAINING ORDER, TO COMPEL ARBITRATION, AND TO STAY FURTHER PROCEEDINGS AND DENYING MERRILL LYNCH'S MOTION FOR TEMPORARY RESTRAINING ORDER

[United States District Court —
Northern District of Texas — Dallas Division]

[Filed July 9, 1991]

(Frank C. Ruscitto, Plaintiff, v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendant — CA3-92-1312-D)

Plaintiff Frank C. Ruscitto ("Ruscitto") on July 3, 1991 and defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") on July 8, 1991 each filed applications for temporary restraining orders. Ruscitto has also requested a stay of the present action and an order compelling Merrill Lynch to arbitrate any disputes with him covered by an arbitration agreement between the parties. Merrill Lynch has also applied for a preliminary injunction.*

The court denies Ruscitto's application for a temporary restraining order. Ruscitto fears Merrill Lynch will seek and obtain *ex parte* relief from a court precluding him from engaging in employment and will oppose engaging in arbitration. To the court's knowledge, however, Merrill Lynch has only sought from this court — and with notice — such injunctive relief. Ruscitto will have a fair opportunity to oppose the injunction request and will not be restrained by an *ex parte* order.

The court denies without prejudice Ruscitto's motion to compel arbitration. Merrill Lynch's July 8, 1991 memorandum, "while not conceding the arbitrability of its claims,"

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* In an order filed July 8, 1991 the court established the regimen for determining Merrill Lynch's preliminary injunction application.

discloses that it "is willing to arbitrate its claims." Mem. at 22. There is apparently no present need for the court to compel arbitration.

The court denies Ruscitto's motion for a stay. He has not shown that Merrill Lynch is without authority to apply for a preliminary injunction even while arbitration is taking place.

The court denies Merrill Lynch's application for a temporary restraining order. To justify entry of a TRO, the movant must demonstrate not only entitlement to a preliminary injunction but that the injury it will incur is so extraordinary as to warrant expedited relief. It has not persuaded the court that a TRO is warranted, *see Arsenault v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CA3-91-1131-G (N.D. Tex. June 21, 1991) (Fish, J.), and should instead promptly pursue its preliminary injunction application and/or arbitration.

The clerk of court shall advise counsel of the entry of this order.

SO ORDERED.

July 9, 1991.

/s/ SIDNEY A. FITZWATER

United States District Judge

APPENDIX D

PER CURIAM OPINION [OF NOVEMBER 12, 1991]

[Fifth Circuit Court of Appeals — on Appeal from the United States District Court — Northern District of Texas — Dallas Division]

[Filed November 12, 1991]

(Frank C. Ruscitto, Plaintiff-Appellant, v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendant-Appellee — No. 91-1869)

Before CLARK, Chief Judge, WILLIAMS and BARKSDALE, Circuit Judges.

PER CURIAM:*

AFFIRMED. See Local Rule 47.6.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

APPENDIX E

STATUS REPORT ORDER [OF DECEMBER 13, 1991]

[United States District Court —
Northern District of Texas — Dallas Division]

[Filed December 13, 1991]

(Frank C. Ruscitto, Plaintiff, v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendant — CA3-92-1312-D)

The court has received and reviewed the parties' December 10, 1991 status report. The parties shall file a similar report on or before February 1, 1992. The court will defer entering an order requiring proposal for pretrial scheduling and discovery order in this action pending receipt of that report.

SO ORDERED.

December 13, 1991.

/s/ SIDNEY A. FITZWATER
United States District Judge

APPENDIX F

CASES IN WHICH A LOWER COURT HAS EITHER ISSUED INJUNCTIVE RELIEF PENDING ARBITRATION OR HAS DIRECTLY CONSIDERED THE ISSUE HERE PRESENTED BY PETITIONER

1. *Dean Witter Reynolds, Inc. v. Francis,* No. 91-15181-J, Dallas County (Texas) District Court, 191st Judicial District, (Jan. 10, 1992) (Brooks, J.);

2. *Merrill Lynch, Pierce, Fenner & Smith v. Sheff,* No. CA3-91-0877-G, U.S. District Court, N.D. Tex., Dallas Division (1991) (Fish, J.);

3. *Arsenault v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. CA3-91-1131-G, U.S. District Court, N.D. Tex., Dallas Division (June 21, 1991) (Fish, J.);

4. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Otzko,* No. 9103400, U.S. District Court, N.D. Illinois, Eastern Division (June 4, 1991) (Leinenweber, J.);

5. *Merrill Lynch. Pierce, Fenner & Smith, Inc. v. Rowell,* No. 91-170-2-Mac, U.S. District Court, M.D. Georgia, Macon Division (May 31, 1991) (Owens, Jr., J.);

6. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Leach,* No. CA3-91-1023-T, U.S. District Court, N.D. Texas, Dallas Division (May 30, 1991) (Maloney, J.);

7. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeLeon,* No. C-91-125, U.S. District Court, S.D. Texas, Corpus Christi Division (May 29, 1991) (Head, J.);

8. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Southwick,* No. 91-2100, U.S. District Court, District New Jersey (May 28, 1991) (Gerry, J.);

9. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Gray,* No. C-91-12O, U.S. District Court, S.D. Texas, Corpus Christi Division (May 24, 1991) (Head, J.);

10. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Altman,* No. 91-B-798, U.S. District Court, D. Colorado (May 20, 1991) (Babcock, J.);

11. *Merrill Lynch, Pierce, Fenner & Smith v. Schwartz,* No. 91-2162, U.S. District Court, D. New Jersey (May 17, 1991) (Politan, J.);

12. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Patinkin,* No. 91-C-2324, U.S. District Court, N.D. Illinois, Eastern Division (May 3, 1991) (Williams, J.);

13. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Romano,* No. 91-C-2432, U.S. District Court, N.D. Illinois, Eastern Division (April 25, 1991) (Parson, J.);

14. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cooner,* No. 91-163L, U.S. District Court, D. Rhode Island (April 17, 1991) (Lagueux, J.);

15. *J.C. Bradford & Co. v. Arnold Brown & Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 9100033, Circuit Court, Roanoke, Virginia (January 22, 1991);

16. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Branch,* C.A. No. W-90-CA-390, U.S. District Court, W.D. Texas (December 21, 1990) (Smith, J.);

17. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lloyd,* No. C-90-3358-VRW, U.S. District Court, N.D. California (December 4, 1990) (Walker, J.);

18. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Blomeyer,* C.A. No. CV-90-C-2492-E, U. S. District Court, N. D. Alabama, (November 20, 1990 and December 19, 1990) (Clemon, J.);

19. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Molfetto,* C.A. No. 1990-5116, New York Supreme Court, Dutchess County (November 26, 1990) (Benson, J.);

20. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Feeney,* No. 90-5085, New York Supreme Court, Dutchess County (October 18, 1990) (Benson, J.);

21. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Barnett,* No. 90-CV-139, U.S. District Court, W.D. Michigan, Southern Division (October 17, 1990) (Enslen, J.);

22. *Wheat First Securities, Inc. v. Ormond,* No. 90-129-CIV-7-F, U.S. District Court, E.D. North Carolina, Wilmington Division (October 2, 1990) (Fox, J.);

23. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Turner,* No. 90-0037-C, U.S. District Court, W.D. Virginia, Charlottesville Division (September 7, 1990) (Michael, J.);

24. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Rosenbaum,* No. 90-C-5031, U.S. District Court, N.D. Illinois, Eastern Division (September 5, 1990) (Conlon, S.);

25. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Setrakian,* No. 90-5296, U.S. District Court, E.D. Pennsylvania (August 14, 1990) (Kelly, J.);

26. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brady,* No. 90-5044, U.S. District Court, E.D. Pennsylvania (August 2, 1990 and August 13, 1990) (Gawthrop, J.);

27. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Luckenbill,* No. 3266, Lancaster County (Pa.) Court of Common Pleas, (August 7, 1990) (Eckman, P.J.);

28. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Mathes,* No. CY-90-3060-AAM, U.S. District Court, E.D. Washington (July 24, 1990) (McDonald, J.);

29. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Tobias,* No. 90-C-20210, U.S. District Court, N.D. Illinois, Western Division (July 17, 1990 and September 12, 1990) (Roszkowski, J.);

30. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeBord,* No. 90-1260, U.S. District Court, M.D. Pennsylvania (July 2, 1990) (Caldwell, J.);

31. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Middleton,* No. 8097190, New York Supreme Court, New York County (April 24, 1990) (Weissberg, J.);

32. *Shearson Lehman Hutton, Inc. v. Kerley,* No. 90-03254, Chester County (Pa.) Court of Common Pleas, (April 19, 1990) (Joyner, J.);

33. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cenci,* No. 90-2560, U.S. District Court, E.D. Pennsylvania (April 13, 1990) (Gawthrop, J.);

34. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Corrado,* No. 90-1715, U.S. District Court, E.D. Pennsylvania (March 16, 1990) (Pollak, J.);

35. *Merrill Lynch, Pierce, Fenner & Smith. Inc. v. Ferry,* No. 607431, Circuit Court St. Louis, Missouri (March 5, 1990);

36. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Tramontano,* No. 4888-90, New York Supreme Court, New York County (March 5, 1990 and March 12, 1990) (Fingerhood, J.);

37. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nelson,* No. 90-0113-E-EJK, U.S. District Court, D. Idaho (February 23, 1990 and March 8, 1990) (Lodge, J.);

38. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cunningham,* No. 90-C-1O34, U.S. District Court, N.D. Illinois (February 23, 1990) (Hart, J.);

39. *McLaughlin, Piven, Vogel, Inc. v. Deutsch,* No. 3881/90, New York Supreme Court, Nassau County (February 21, 1990) (Levitt, J.);

40. *Merrill Lynch. Pierce, Fenner & Smith. Inc. v. Hemphill,* No. 90-2464, Delaware County (Pa.) Court of Common

Pleas (February 20, 1990 and February 22, 1990) (Bradley, J.);

41. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeLorenzo,* No. 90-21, U.S. District Court, W.D. Pennsylvania (January 26, 1990) (Mencer, J.);

42. *Shearson Lehman Hutton, Inc. v. Howell,* No. 89-043880, Harris County (Texas) District Court, 280th Judicial District, (October 16, 1989) (Lindsay, J.);

43. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Price,* No. 11097, Delaware Court of Chancery, New Castle County (September 13, 1989 and September 21, 1989) (Allen, J.);

44. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King,* No. 89-HM-5338-NE, U.S. District Court, N.D. Alabama (August 1, 1989) (Halton, J.);

45. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Totten,* No.89-105, U.S. District Court, E.D. Kentucky, Ashland Division (June 12, 1989);

46. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Switow,* No. 89-0494-L-B, U.S. District Court, W.D. Kentucky, Louisville Division (June 7, 1989) (Ballantine, J.);

47. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kudler,* No. 89-0609, U.S. District Court, M.D. Pennsylvania (May 1, 1989) (Caldwell, J.);

48. *Blumenthal and Fein v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 89-1209, U.S. District Court, S.D. New York (February 23, 1989 and February 27, 1989) (Keenan, J.);

49. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bender,* No. 89-0096, U.S. District Court, M.D. Pennsylvania (January 20, 1989) (Conaboy, J.);

50. *Rainer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 88-8306, U.S. District Court, E.D. Pennsylvania (October 28, 1988 and October 31, 1988) (Newcomer, J.);

51. *Merrill Lynch, Pierce, Fenner & Smith v. Kehoe*, No. 88-7387, U.S. District Court E.D. Pennsylvania (September 26, 1988) (Ludwig, J.);

52. *Merrill Lynch, Pierce, Fenner & Smith v. Hondula*, No. 88-1096, U.S. District Court, D. New Jersey (March 14, 1988) (Lechner, Jr., J.);

53. *Merrill Lynch, Pierce, Fenner & Smith v. Hook*, No. 88-1097, U.S. District Court, D. New Jersey (March 14, 1988) (Lechner, Jr., J.);

54. *Lenahan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 88-0241, U.S. District Court, M.D. Pennsylvania (February 19, 1988) (Nealon, J.);

55. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hess*, No. 88-0160, U.S. District Court, M.D. Pennsylvania (Feb. 2, 1988, February 19, 1988, and February 19, 1988) (Herman, J.);

56. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Atherholt*, No. 88-0110, U.S. District Court, M.D. Pennsylvania (January 24, 1988) (Nealon, J.);

57. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Donnell*, No. 87-3771, U.S. District Court, D. New Jersey (September 18, 1987) (Ackerman, J.);

58. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Fisher*, No. 87-3621, U.S. District Court, D. New Jersey (September 9, 1987) (Rodriguez, J.);

59. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adams*, No. 87-0953, U.S. District Court, M.D. Pennsylvania (July 13, 1987) (Caldwell, J.);

60. *Merrill Lynch, Pierce, Fenner & Smith v. Legg, Mason, Gillon*, No. 87-353-WS, U.S. District Court, M.D. North Carolina (June 2, 1987 and June 10, 1987);

61. *Payes v. Merrill Lynch, Pierce, Fenner & Smith*, No. 87-0610, U.S. District Court, M.D. Pennsylvania (May 6, 1987) (Caldwell, J.);

62. *Merrill Lynch, Pierce, Fenner & Smith v. Tramo*, No. 87-01992, Montgomery County Court of Common Pleas (February 12, 1987) (Salus, J.);

63. *Thomson McKinnon Securities, Inc. v. Panarass and Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 1986-CE-7086, Northampton County Court of Common Pleas (September 16, 1986) (Franciosa, J.);

64. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moose Beard & Rohrbaugh*, No. 86-SU-02235-07, York County Court of Common Pleas (June 9, 1986) (Miller, J.);

65. *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Company, Inc.*, 498 N.Y.S. 2d 146, 114 A.D. 2d 165 (1986) App. Div. (2d Dep't February 3, 1986) (Weinstein, J.);

66. *Merrill Lynch, Pierce, Fenner & Smith v. Bradley*, 756 F. 2d 1048 (4th Cir. 1985);

67. *Propane Gas Co. of Puerto Rico, Inc. v. Sony Consumer Products Co.*, 613 F.Supp. 215 (D.P.R. 1985);

68. *Merrill Lynch, Pierce, Fenner & Smith v. Clark*, No. 84-04718, Montgomery County Court of Common Pleas (April 6, 1984) (Brown, J.);

69. *Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 575 F.Supp. 904 (N.D. Tex. 1983);

70. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. de Liniere*, 572 F.Supp. 246 (N.D. Ga. 1983);

71. *Dean Witter Reynolds, Inc. v. Carlin*, No. 83-4417, U.S. District Court, D. New Jersey (November 18, 1983);

72. *Merrill Lynch, Pierce, Fenner & Smith v. Fogler*, No. 83-4342, U.S. District Court, D. New Jersey (November 10, 1983) (Bissell, J.);

73. *Merrill Lynch, Pierce, Fenner & Smith v. Sims*, No. 83-7917-05, Bucks County Court of Common Pleas (November 3, 1983);

74. *Merrill Lynch, Pierce, Fenner & Smith v. Taksler*, No. 0-3748-83, N.J. Super. Ct. Ch. Div. (Sept. 13, 1983);

75. *Merrill Lynch, Pierce, Fenner & Smith v. Pilon, Moffett and Bradley*, No. 83-6014, Westmoreland County Court of Common Pleas (August 23, 1983) (Scherer, J.);

76. *Merrill Lynch, Pierce, Fenner & Smith v. Carnevale*, No. 83-10565, Montgomery County Court of Common Pleas (July 20, 1983) (Vogel, J.);

77. *Merrill Lynch, Pierce, Fenner & Smith v. Roodveldt*, No. 83-09272, Montgomery County Court of Common Pleas (June 23, 1983) (Suber, J.);

78. *Merrill Lynch, Pierce, Fenner & Smith v. Baird*, No. 83-2635, Philadelphia County Court of Common Pleas (May 19, 1983) (Greenberg, J.);

79. *Merrill Lynch, Pierce, Fenner & Smith v. Grabowski*, No. 83-600, Philadelphia County Court of Common Pleas (March 17, 1983) (Greenberg, J.);

80. *Merrill Lynch, Pierce, Fenner & Smith v. Gorman*, No. 83-CV-915, Wisc. Cir. Ct. (March 10, 1983);

81. *Merrill Lynch, Pierce, Fenner & Smith v. Kahn*, New York Supreme Court (October 18, 1982) (Stone, J.);

82. *Merrill Lynch, Pierce, Fenner & Smith v. Vanderheijden and Bender*, No. 22, Lancaster County Court of Common Pleas (August 20, 1982) (Eckman, J.);

83. *Merrill Lynch, Pierce Fenner & Smith v. Branson*, No. 82-3136, New York Supreme Court (June 24, 1982) (Lynch, J.).

APPENDIX G

469 U.S. 1127, 83 L.Ed.2d 804

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

V.

ERNEST M. MCCOLLUM et al. No. 84-629.

Rehearing Denied Feb. 25, 1985.
See 470 U.S. 1024, 105 S.Ct. 1384.
Case below, 666 S.W.2d 604.

On petition for writ of certiorari to the Court of Appeals of Texas, Fourteenth Supreme Judicial District.

Jan. 7, 1985. The petition for a writ of certiorari is denied.

Justice WHITE, with whom Justice BLACKMUN joins, dissenting.

This petition presents the question whether § 3 of the Federal Arbitration Act, 9 U.S.C. § 3, bars a court from issuing a temporary injunction pending arbitration of a contractual dispute. [1] Respondent McCollum (hereafter respondent) is a former employee of petitioner Merrill Lynch, Pierce, Fenner and Smith, Inc. The employment contract signed by Merrill Lynch and respondent provided that in the event that respondent's employment with Merrill Lynch was terminated, respondent would not be allowed to remove client lists

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[1] Section 3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

from the premises of Merrill Lynch nor to solicit any of Merrill Lynch's clients for a period of one year from the date of termination. The contract also provided that "any controversy between [respondent] and Merrill Lynch arising out of [respondent's] employment, or the termination of [respondent's] employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party . . . ."

Respondent left petitioner and obtained a position with one of petitioner's competitors. Alleging that respondent had violated the terms of his contract by absconding with petitioner's client lists and soliciting petitioner's clients, petitioner sued respondent for damages and injunctive relief in the District Court for Harris County, Texas. After entering a temporary restraining order enjoining respondent from any actions in violation of the contract, the District Court concluded that the dispute was arbitrable and that the court therefore lacked authority to adjudicate it. Accordingly, although the court was of the opinion that petitioner would have been entitled to injunctive relief but for the arbitration clause, the court dissolved its restraining order, denied petitioner's motion for a temporary injunction, and stayed all further proceedings in the action pending arbitration of the underlying dispute.

Petitioner appealed the District Court's order to the Texas Court of Appeals. Petitioner attacked the trial court's finding that the dispute was arbitrable, the denial of preliminary injunctive relief, and the order compelling arbitration. The Court of Appeals affirmed the lower court on all three issues. 666 S.W.2d 604 (1984). In upholding the denial of the preliminary injunctive relief pending arbitration, the Court of Appeals interpreted § 3 of the Federal Arbitration Act (applicable, in the court's view, to state as well as federal courts) to command an immediate halt to judicial proceedings once a court determines that the dispute underlying an action is arbitrable. Judicial resolution of the issues involved

in a motion for injunctive relief, the court held, would be inconsistent with the Act's command that the merits of the dispute be determined by the arbitrator. Thus, the court concluded that § 3 of the Arbitration Act precludes a court from entering a preliminary injunction to maintain the status quo pending arbitration in any arbitrable dispute.

The Supreme Court of Texas denied petitioner's application for a writ of error to review the judgment of the Court of Appeals, and petitioner filed this timely petition for certiorari.

The question presented by this case — whether the Arbitration Act bars a court from issuing a preliminary injunction in a case subject to arbitration — is one that has divided the state and federal courts. [2] In adopting the position that preliminary injunctive relief is unavailable, the Texas Court of Appeals followed recent rulings of the Federal Courts of Appeals for the Eighth and Tenth Circuits, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1291 (CA8 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott*, No. 83-1480 (CA10, May 12, 1983) (unpublished order). However, the Second and Seventh Circuits, apparently untroubled by § 3 of the Arbitration Act, have routinely held that preliminary injunctions are available to maintain the status quo pending arbitration even in actions subject to

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[2] Petitioner contends not only that the Texas Court of Appeals misconstrued § 3 of the Arbitration Act, but also that § 3 is inapplicable in state-court proceedings. Although this Court, in holding that state courts must apply § 2 of the Act, has reserved the question whether § 3 applies to the state courts, *see Southland Corp. v. Keating*, 465 U.S. 1, 16, n. 10, 104 S.Ct. 852, 861, n. 10, 79 L.Ed.2d 1 (1984), petitioner cites no authority for the proposition that § 3 does not apply, and there appears to be no substantial disagreement among the state courts over § 3's applicability. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26, n. 34, 103 S.Ct. 927, 942, n. 34, 74 L.Ed.2d 765 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed*, 405 So.2d 790 (Fla. App. 1981).

the Arbitration Act's command that the court compel arbitration rather than adjudicating the underlying dispute. *See Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (CA7 1983); *Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp.*, 705 F.2d 31 (CA2 1983); *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.*, 613 F.2d 468 (CA2 1980); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (CA2 1972). The Supreme Court of Colorado has also recently held (without any discussion of the Arbitration Act) that a preliminary injunction to maintain the status quo is available in an action in which a court is otherwise obligated to stay its proceedings and compel arbitration. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court of Denver*, 672 P.2d 1015 (1983).

The importance of resolving the question of the availability of preliminary injunctive relief in cases subject to arbitration is underscored by the confusion over the issue among the Federal District Courts — courts whose decisions on the issuance of preliminary relief are often effectively final, given that the imminence of arbitration may sharply limit a party's incentives to appeal an adverse decision. In an opinion written in 1951, Judge Weinfeld of the Southern District of New York concluded that the power to issue a preliminary injunction pending arbitration follows from the court's power to compel arbitration, for "[i]t would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration which it has just directed and permit him to assert his 'right to breach a contract and to substitute payment of damages for nonperformance.'" *Albatross S.S. Co. v. Manning Bros., Inc.*, 95 F. Supp. 459, 463 (1920) (quoting O. Holmes, Collected Legal Papers 175). Judge Weinfeld's reasoning was adopted by the District Court for the Eastern District of New York in *Janmort Leasing, Inc. v. Econo-Car International, Inc.*, 475 F. Supp. 1282 (1979). In other recent cases, however, District Courts have concluded that they lack the power to issue a preliminary injunction in cases subject to

§ 3 of the Arbitration Act. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro,* 577 F. Supp. 616 (WD Mo. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert,* 577 F. Supp. 406 (MD Fla. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson,* 575 F. Supp. 978 (ND Fla. 1983); *Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 575 F. Supp. 904 (ND Tex. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson,* 574 F. Supp. 1472 (ED Mo. 1983). But cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. De Liniere,* 572 F. Supp. 246 (ND Ga. 1983), in which the court, in a case governed by § 3, apparently assumed it had the power to grant a preliminary injunction but denied the injunction on the merits.

Whether the Arbitration Act bars the issuance of a preliminary injunction pending arbitration appears to be a frequently litigated question of considerable importance to the parties to arbitration agreements. The issue is one well worth definitive resolution by this Court. The most obvious obstacle to review of this particular case is that the arbitration proceedings will likely have begun and ended — mooting the issue of relief pending arbitration — by the time this Court has the opportunity to resolve the issue. This obstacle, however, is more apparent than real. The Court has recognized an exception to its general mootness doctrine for cases presenting issues that are "capable of repetition, yet evading review." See, *e.g., Sosna v. Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). In *Weinstein v. Bradford,* 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975), we held that "the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 149, 96 S.Ct., at 348. Both criteria are satisfied in this case. It would be the rare case indeed in which an arbitration proceeding

compelled under the Arbitration Act would not have commenced before the issue of the propriety of injunctive relief pending arbitration found its way to this Court. Thus, unless the Court is willing to apply the "capable of repetition, yet evading review" doctrine, it is likely that the issue will never be conclusively resolved here. Moreover, the likelihood that petitioner will again find itself in the position of seeking injunctive relief pending arbitration of a contractual dispute with a former employee seems substantial: in fact, several of the courts that have so far examined the issue have done so in proceedings initiated by petitioner. The question, then, is one that is "capable of repetition, yet evading review"; and in view of its importance, I would grant certiorari to resolve it.

APPENDIX H

NEW YORK STOCK EXCHANGE RULE REQUIRING ARBITRATION

2 N.Y.S.E. GUIDE (CCH)

¶2347 Controversies As to Employment or Termination of Employment

Rule 347. Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.